IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, 99AG25112 Plaintiff, v. VERTRUE, INCORPORATED, (formerly known as MEMBERWORKS, INC.), a Delaware corporation; ADAPTIVE MARKETING, LLC, a Delaware limited liability company; IDAPTIVE MARKETING, LLC, a Delaware limited liability company; Defendants.	Equity No. EQCE053486 **RULING AS TO INJUNCTIVE RELIEF AND OTHER REMEDIES: FINAL JUDGMENT**

On October 25, 2010 the above-captioned matter came before the Court for trial on the remedies phase of the case, the Court having previously bifurcated the proceeding between the liability and remedies phases. This ruling follows the Court's March 18, 2010 Ruling as to Liability[1] in this cause, which is incorporated herein. The Liability Ruling found that Defendants' marketing to Iowans violated the Buying Club Memberships Law, Iowa Code Ch. 552A (hereinafter, the "BCL"), and, independent of the BCL violations, that certain marketing practices violated the Consumer Fraud Act, Iowa Code § 714.16 ("CFA").

During the remedies trial, Plaintiff presented the testimony of John Hugg, Information Technology Specialist for the Iowa Department of Justice, and offered numerous documents as

1 Hereinafter, "Liability Ruling."

exhibits. Plaintiff also submitted the deposition testimony of Barry Cutler, an expert called by Defendants to testify at the liability trial. Defendants presented the testimony of Bruce Douglas, General Manager for Adaptive Marketing, and Sean Rattigan, Adaptive Marketing's Director of Data Specialists Core Systems, and also offered documents as exhibits. Consistent with Iowa authority regarding evidence in equity proceedings, trial exhibits were received subject to whatever objections were made.

The Court will begin by ruling on objections that have been made to exhibits offered at the remedies trial, after which the Court will address the laws and legal principles that govern the remedies determinations to be made. The Court will then determine what remedies are appropriate, first for violations of the BCL, and then for violations of the CFA. Finally, the Court will order appropriate relief and enter final judgment.

EVIDENTIARY RULINGS

Numerous exhibits were received at trial without objection. This section provides the evidentiary rulings for those instances in which an objection was made and the exhibit was received subject to the objection. To the extent that relevance objections were made, the Court has taken such objections into account in evaluating the evidence in question, but finds that none of the exhibits offered should be excluded on relevance grounds, and those objections are therefore overruled. Other objections are addressed below. To the extent the Court ultimately relies on evidence to which an objection was posed, without having ruled on the objection, the objection is overruled.

Plaintiff's Exhibits

Hugg affidavit (Pl.'s Ex. 644): Defendants objected on the grounds of hearsay and foundation. Thereafter, however, Plaintiff produced Mr. Hugg as a witness and Defendants had

a full opportunity to question Mr. Hugg, regarding the subject of his affidavit and otherwise. Furthermore, Mr. Hugg directly testified about a portion of the contents of his affidavit during his testimony. Accordingly, Defendants' objections are overruled and this exhibit is received.

Data summaries and profiles derived from the customer transaction database (Pl.'s Ex. 612, 613, 618, 619, 621, 623, 626, 627, 629, 631, 643): At the outset of trial, Plaintiff offered several exhibits created by John Hugg using the customer transaction database produced in discovery by Defendants,[2] urging their admissibility under Iowa Rule of Evidence 5.1006 and citing *State v. Fingert*, 298 N.W.2d 249, 255-56 (Iowa 1980), as support. Defendants nevertheless objected to these various summaries and profiles, primarily on foundation grounds, arguing that Mr. Hugg's testimony was necessary to establish foundation. Although Plaintiff disputed Defendants' foundation objections, Plaintiff nevertheless elected to produce Mr. Hugg as a witness. This rendered the dispute over foundation requirements moot, as Mr. Hugg's testimony provided adequate foundation for these exhibits. Indeed, Mr. Hugg testified to having generated these exhibits in a manner virtually indistinguishable from the manner in which Defendants generated comparable exhibits. *Compare* 10/26/10 Trial Tr. at 87-90 *with* 216-18. The foundation objections are overruled, and the exhibits are received.

On October 29, 2010, Plaintiff filed a motion for leave to substitute a corrected version of Exhibit 621, designated Exhibit 621a. The motion for leave was not resisted by Defendants, and Exhibit 621a is received.

Summaries of evidence (Pl.'s Ex. 615, 620): Defendants made foundation objections to these exhibits that were created by Plaintiff. The exhibits are admissible as summaries of

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2 The underlying database itself (Pl.'s Ex. 582) was received without objection.

voluminous documents under Iowa Rule of Evidence 5.1006.[3] Therefore the foundation objections are overruled.

Senate Report (Pl.'s Ex. 556): In addition to a relevance objection (discussed above), Defendants objected on the grounds of hearsay. This exhibit is admissible as an official government report subject to Iowa Rule of Evidence 5.803(8). Therefore, the relevance and hearsay objections are overruled. However, as argued by Defendants and noted by the Court, Defendants did not participate in the Senate hearing and did not have the opportunity to cross-examine the witnesses who testified. Therefore the Court has given only limited consideration to the contents of the Senate report, and has relied upon its own observations and conclusions in reaching its findings and conclusions set forth below.

Documents regarding attorney fees and costs (Pl.'s Ex. 641, 642, 645, 646): Defendants objected that these attorney affidavits and time records submitted in support of Plaintiff's claim for attorney fees and state's costs constituted hearsay, noting that Defendants might want to cross-examine the affiants. However, in Defendants' subsequent submission addressing attorney fees, Defendants accepted both the total hours for which Plaintiff sought to be compensated, and the hourly rates.[4] Defendants limited their challenge to issues which do not bear directly on the admissibility of the exhibits in question. Therefore, these exhibits are admitted.

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[3] A portion of Pl.'s Ex. 615 ("Net Total") was derived by Mr. Hugg from the database in the manner described above; his testimony provided the foundation for that portion. The remaining portion of Exhibit 615 is a summary of Exhibit 566 (benefit grid,) which was received without objection. 10/25/10 Trial Tr. at 59.

[4] Defendants' Response to State's Application for Attorney Fees and Investigative Costs, filed November 15, 2010.

Documents produced by Defendants in discovery (Pl.'s Ex. 14, 313, 372): To the extent that Defendants raised foundation or other objections to these bates-stamped documents that Defendants produced to Plaintiff in discovery, those objections are overruled.

Deposition of Barry Cutler (Court Ex. 22): Defendants' post-trial relevance objections to Plaintiff's page and line designations of Mr. Cutler's deposition[5] are overruled, as discussed above.

Defendants' Exhibits

CDs of Adaptive Marketing scripts (Defs.' Ex. SC through SV): Plaintiff objected on foundation grounds and also because these exhibits had never been previously produced to the State; the exhibits purport to be queried subsets of telemarketing scripts. Plaintiff contends that no foundation has been established for the process of the query, and complains that these exhibits were produced for the first time a day before the remedies trial. Given that Defendants provided no witness to establish foundation, and given the untimeliness of the production of these exhibits to Plaintiff, these exhibits are excluded.

National Consumer League (NCL) brochure and news release (Defs.' Ex. RV and RW, respectively): Plaintiff objected to these exhibits as hearsay. Counsel for Defendants offered these exhibits to show that Vertrue and the NCL worked on the development of a consumer education brochure. 10/26/10 Trial Tr. at 258. Defendants seek to make this showing by offering the out-of-court statements in these exhibits for the truth of the matters asserted; this constitutes hearsay. No exception to the hearsay rule has been asserted by Defendants, and none appears to the Court. These exhibits are therefore excluded under Iowa Rule of Evidence 5.802.

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5 Supplemental Filings by Defendants, filed November 15, 2010.

REMEDIES AVAILABLE UNDER APPLICABLE LAW

Buying Club Law

In a section of the Buying Club Memberships Law (BCL) entitled "Remedies," the BCL provides that, for purposes of remedies, a violation of that law is a *per se* violation of Iowa Code § 714.16(2)(a), the subsection of the Consumer Fraud Act (CFA) that prohibits (*inter alia*) deceptive and unfair practices. *See* Iowa Code § 552A.5(1). This provision, accordingly, has the effect of making all remedies contained within the CFA available in connection with a violation of the BCL.

Consumer Fraud Act

The CFA provides for reimbursement,[6] injunctive relief, and civil penalties (Iowa Code § 714.16(7)), as well as attorney fees and costs (Iowa Code § 714.16(11)). Iowa Code § 714.16(7) further provides that if the cost of administering reimbursement outweighs the benefit to consumers or if consumers entitled to reimbursement cannot be located through reasonable efforts, the court may order disgorgement of moneys acquired.

Separate determination of remedies for violations of the BCL and the CFA

In the Liability Ruling, this Court held that Defendants'[7] marketing independently violated the BCL and the CFA. Each law, therefore, provides a separate and distinct basis for the imposition of remedies. The Court will address injunctive relief separately for the BCL and the CFA, so that the injunctive language can be tailored to the particular conduct under

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6 This remedy is described in the current CFA as the power to "restore to any person in interest any moneys" acquired by means of unlawful practices, and also as the power to administer "reimbursement" to consumers. Iowa Code § 714.16(7). The legislature substituted the word "reimbursement" for "restitution" in 1994, but evidently did so for reasons unrelated to effecting any substantive change in the remedies available under the Act. *See* Acts 1994, 75th G.A., Ch. 1142 ("An act relating to criminal offenders and the department of corrections ..."). Accordingly, the Court will use "reimbursement" and "restitution" interchangeably in this ruling.

7 "Defendants" or "Vertrue" as used herein refers to all three named defendants unless the context otherwise requires.

consideration. Reimbursement/disgorgement[8] and civil penalties will also be addressed separately under the BCL and the CFA; separate determinations may prove important for issues on appeal. However, in making a reimbursement award under each of these laws the Court will avoid double recovery. To the extent application of either law results in complete reimbursement for an identifiable group of transactions, application of the other law will not increase the award for those same transactions.[9] As to attorney fees and costs, they will be addressed together, in light of the interrelatedness of the claims.

Legal principles relating to complex remedies determinations

The violations of law identified in the Liability Ruling occurred over the course of some twenty years of marketing, and involved more than 901,228 separate memberships. *See* Pl.'s Ex. 612.[10] Defendants sold a shifting array of programs to Iowans, as some programs would be retired from time to time and others created; currently about 238 different programs appear in the database. *See* Pl.'s Ex. 612. Solicitations were conducted through different marketing channels: direct mail, telemarketing (inbound and outbound), and the Internet. Solicitation approaches were also subject to change within a marketing channel, meaning that there were a large number of different direct mail pieces, telemarketing scripts, and Internet landing pages; however, the material terms remained the same.[11]

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8 "Reimbursement" for these purposes includes such disgorgement as is necessary to ensure that Defendants do not retain any money acquired by means of their unlawful conduct.

9 Similarly, to the extent this judgment awards funds to be distributed as consumer reimbursement, the Attorney General is expected to avoid double recovery by consumers in connection with the process the Attorney General may elect to employ.

10 Billing and membership information was derived from Defendants' consumer database as of July 17, 2010. Pl.'s Ex. 582.

11 As discussed more fully below, Defendants asserted throughout this litigation that key features remained the same, permitting reliance on exemplars.

Such a welter of marketing variables makes it difficult to disentangle and discern the specific impact of unlawful activities on a specific individual, particularly since such activities sometimes cut across programs and marketing channels. Defendants have acknowledged as much; in resisting Plaintiff's efforts to require them to provide a matrix showing which Iowans were harmed by which violations, Defendants insisted that the task is all but impossible, and that individual consumers cannot be confidently matched with particular scripts, direct mail pieces, fulfillment materials, or landing pages. Pl.'s Ex. 560.

In its post-trial brief regarding remedies, defendant goes even further. Vertrue advances the argument that before disgorgement can be considered as a remedy by the Court, the State must prove the amount necessary to restore to any person in interest any moneys or property which have been acquired by means of an unlawful practice, citing Iowa Code § 714.16(7). In other words, Vertrue asserts that proof of specific amounts owed to individual consumers is a predicate to the language which appears later in § 714.16(7) which states:

> If a person has acquired moneys or property by any means declared to be unlawful by this section and if the cost of administering reimbursement outweighs the benefit to consumers or consumers entitled to the reimbursement cannot be located through reasonable efforts, the court may order disgorgement of moneys or property acquired by the person by awarding the moneys or property to the state to be used by the attorney general for the administration and implementation of this section.

Defendant cites no authority in support of this extraordinary proposition, which would mean that a violator of the CFA could keep its ill gotten gains as long as its victims could not be specifically identified and tied to specific amounts of damage, regardless of the seriousness of the violation or strong proof of evidence of damage to consumers generally.

In enforcement actions such as this, the law has evolved to address such challenges to prevent the wrongdoer from benefitting from its victimization. In *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997), the court addressed the challenges of determining equitable restitution and

disgorgement in connection with the deceptive promotion of work-at-home opportunities to about two hundred thousand consumers. Having established the underlying deception, the FTC used the defendants' own customer database to calculate the net losses suffered by victims of the scheme. *Id.* at 535. The defendants, however, challenged the FTC's calculations, objecting that the computer database lacked certain necessary information. *Id.* The court, noting that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty," found that once the FTC had provided calculations that "reasonably approximated the amount of customers' net losses ... the burden shifts to the defendants to show that those figures were inaccurate." *Id.* (quoting *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)). The *Febre* court gave particular attention to the difficulties created by defendants' own record keeping system, ruling that where "lawful gains cannot be distinguished from the unlawful without incurring inordinate expense, it is well within the district court's power to rule that the measurement of disgorgement will be the more readily measurable amount of losses incurred by the defendants' customers in the unlawful transactions." *Id.* (citing *FTC v. American Metals Exchange Corp.*, 991 F.2d 1242, 1252 (2d Cir. 1986)). *See also First City Financial Corp.*, 890 F.2d at 1231 ("If exact information were obtainable at negligible cost, we would not hesitate to impose upon the government a strict burden to produce that data to measure the precise amount of ill-gotten gains. Unfortunately, we encounter imprecision and imperfect information.... Rules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task."); *FTC v. Lorin*, 76 F.3d 458, 462 (3d Cir. 1996) (stating that where disgorgement calculations cannot be exact, the burden of uncertainty should fall on the wrongdoer).

These principles were recently applied in *FTC v. Inc21.com Corporation*, No. 10-00022, 2010 WL 3789103, at *1 (N.D. Cal. Sept. 21, 2010), an FTC action involving unauthorized charges stemming from deceptive telemarketing and Internet practices. In *Inc21*, most consumer victims were telemarketed through claims of a free trial period, followed by charges upon failure to cancel. *Id.* at *14. Customers' actual usage was negligible. *Id.* at *16. Refunds were given grudgingly, with full refunds reserved for consumers who threatened to contact law enforcement or the Better Business Bureau. *Id.* at *15.

The court observed that the great majority of consumers subjected to defendants' scheme received no benefit at all "from services that they never agreed to purchase, didn't know were being provided to them, and never wanted in the first place." *Id.* at *23.[12] As to effecting restitution, the court observed that courts had often awarded restitution in the full amount of funds lost by consumers, and that the FTC "is not required to prove that every individual consumer was injured to justify such an award." *Id.* at *30; *see also Febre*, 128 F.3d at 537 (noting the importance of disgorgement as a remedy, to ensure that defendants are not unjustly enriched by retaining unlawful proceeds by virtue of the fact that they cannot identify all the consumers entitled to restitution). Requiring such individualized proof would, the court found, "thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals" of the FTC Act. *Inc21.com* at *30 (citing *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993)). The court continued:

> As such, it is sufficient for the FTC to prove that misrepresentations were widely disseminated (or impacted an overwhelming number of consumers) and caused actual

[12] In response to defendants' argument that consumers should have mitigated their losses by scrutinizing their bills and disputing the charges, the court declined "to blame unsuspecting consumers for failing to detect and dispute unauthorized billing activity. As other courts have wisely concluded, the burden should not be placed on defrauded customers to avoid charges that were never authorized to begin with." *Id.* at *23. This Court agrees, and rejects Defendants' argument that reimbursement or disgorgement should be reduced for such an "equitable" consideration.

> consumer injury.... If the FTC can meet this burden, it must then "show that its calculations reasonably approximated the amount of customers' net losses[.]" Then, "the burden shifts to the defendants to show that those figures [are] inaccurate."

Id.

These principles are appropriately applied to facets of the instant litigation.[13] Anything less would be tantamount to rewarding Defendants for victimizing tens of thousands of Iowans for two decades and making it nearly impossible to match individual consumers to particular scripts, direct mail pieces, fulfillment materials, or landing pages.[14] Indeed, the goals of the CFA would be upended if a wrongdoer who victimized fifty consumers and kept careful records would be ordered to provide full restitution for all ill-gotten gains, but a more egregious wrongdoer who victimized 500,000 consumers and kept incomplete records would escape having to provide full restitution. A wrongdoer who made it impracticable to match the unlawful practice to an individual consumer, or who victimized such a large volume of consumers that it would paralyze any enforcement agency to wade through millions of records to provide individualized proof, should derive no benefit from the difficulties for which it was responsible.

Here, the application of the restitution approach noted above is particularly warranted because Defendants, prior to the remedies phase of this proceeding, repeatedly represented to the Court and Plaintiff that their practices should be evaluated with reference to representative exemplars, stating that the key elements of the solicitations were identical in all material respects, and on that basis resisted Plaintiff's efforts to obtain discovery of variations in the

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13 Application of such principles receives additional support from the CFA's express recognition that a court crafting a restitution award may adopt approaches that reflect the reality of a large volume of victims: "A claim for reimbursement may be proved by any competent evidence, including evidence that would be appropriate in a class action." Iowa Code § 714.16(7).

14 Defendants' attempt to fault the Attorney General for seeking remedies for the entire length of Defendants' unlawful marketing is ineffective and unconvincing.

marketing approaches and how those variations might be linked to individual consumers.[15] Indeed, based on Defendants' representations, both parties tried the liability phase of trial on representative exemplars. *See, e.g.*, Feb. 6, 2009 Hr'g Tr. at 59-61; Pl.'s Exs. 571-577; 10/29/09 Trial Tr. at 76-77; 10/30/09 Trial Tr. at 132; 11/2/09 Trial Tr. at 11, 38, 40, 82-83; 11/3/09 Trial Tr. at 16, 169-70; 11/4/09 Trial Tr. at 76.

REMEDIES FOR VIOLATIONS OF THE BUYING CLUB LAW

Injunctive relief for BCL violations

A court confronted with violations of the BCL may issue a permanent injunction, and may make such orders as are necessary to prevent the use or employment of any prohibited practices. Iowa Code §§ 552A.5(1) and 714.16(7). Having found that Defendants are liable for violating the BCL, the Court further finds that a permanent injunction should issue. In connection with all future Iowa marketing of memberships subject to the BCL, Defendants are to be enjoined from disregarding the contract, notice, disclosure, and all other requirements of the BCL.[16] In addition, Defendants are to be enjoined from further billing of Iowa consumers for memberships that were created in violation of the BCL.

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[15] Only after the Liability Ruling did counsel for Defendants state for the first time that the "exemplar" concept applied only to direct mail pieces and fulfillment kits. *Compare* July 12, 2010 Hr'g at 18-19 *with* Pl.'s Ex. 577. Now, however, Defendants contend that *no* reliance upon exemplars is appropriate as part of the determination of remedies. Defs.' Post-trial Remedies Br. at 45-46; 10/25/10 Trial Tr. at 39. As noted above, however, the Court disagrees. Defendants complain that the State changed its approach, from attacking Defendants' business model as a whole to individual marketing practices, only after the Court's Ruling on Liability. While it is true that the State targeted Defendants' entire business model, it is equally true that Defendants knew or should have known that the State was also targeting the specific marketing practices found by the Court to constitute violations of the CFA.

[16] One of Defendants' arguments in connection with the impossibility of compliance with the BCL has been that there is no way for the Defendants to meet the "writing" requirements of the Door to Door Sales Act and BCL as a company transacting business from outside of Iowa through the use of the Internet, direct mail and telephone solicitations. Both the State and the Court have repeatedly disagreed with Defendants' contention. Defendants ignore the extent to which legislatures and the courts have recognized how legal requirements for writings have evolved just as the methods of commerce have evolved. *See, e.g., State v. Fischer,* 785 N.W.2d 697, 701-706 (Iowa 2010) (use of a computer screen rather than a paper document is sufficient to satisfy statutory written request requirement); 15 U.S.C. § 7001(c)(1)(stating that use of electronic records satisfies "in writing" requirements so long as the consumer affirmatively consents and other conditions are satisfied); *Crestwood Shops, L.L.C. v. Hilkene,* 197 S.W.3d 641, 651 (Mo. App. W.D. 2006)(stating that e-mail satisfies statute of frauds under the Uniform

Reimbursement and disgorgement for BCL violations

In the Liability Ruling, this Court found that none of Defendants' marketing of memberships in discount programs in Iowa, in any marketing channel, complied with the BCL, and that "[e]ach of the three Vertrue Defendants is jointly and severally liable for each violation of the Buying Club Law." Liability Ruling at 27. The Court must now determine which programs were subject to the BCL requirements and therefore violated that law, and whether the State can obtain reimbursement or membership fees associated with such programs under the BCL.

Programs subject to the BCL: After the liability trial, Defendants for the first time asserted that some of their programs were not "memberships" within the meaning of the BCL because they did not entitle the member "to purchase merchandise ... at a discount, at cost plus a percentage, at cost plus a fixed amount, at a fixed price, or on any other similar basis."[17] Iowa Code § 552A.1(3). In the Court's September 20, 2010 Ruling on the State's Fifth and Sixth Motions to Compel Discovery, the Court noted that Defendants had adopted the position that only certain programs were *not* covered by the BCL, namely the programs to which Defendants

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Electronic Transactions Act where all parties agree to use such correspondence); *International Casings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F.Supp.2d 863, 873-74 (W.D. Mo. 2005)(citing *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289 (7th Cir.2002); *Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 245 F.Supp.2d 251 (D.Me.2003); *Central Illinois Light Co. v. Consolidation Coal Co.*, 235 F.Supp.2d 916, 919 (C.D.Ill.2002); *Commonwealth Aluminum Corp. v. Stanley Metal Association*, 186 F.Supp.2d 770, 774 (W.D.Ky.2001); *Rosenfeld v. Zerneck*, 4 Misc.3d 193, 776 N.Y.S.2d 458 (N.Y.Sup.2004); *Shattuck v. Klotzbach*, 2001 WL 1839720, No. 011109A (Mass.Super. Dec. 11, 2001); *Amedisys, Inc. v. JP Morgan Chase Manhattan Bank* (*In re National Century Financial Enterprises, Inc.*), 310 B.R. 580, 595 (Bankr.S.D.Ohio 2004)) (all supporting the finding that electronic signatures and/or electronic documents satisfy the writing requirement of the statute of frauds); Restatement (Third) of Suretyship & Guaranty § 11, cmt. b (1996)(stating that, "[i]t should be noted that the determination of what constitutes a writing or a signature in an environment of electronic data transmission must continue to evolve."); 110 A.L.R.5th 277, *Satisfaction of Statute of Frauds by E-Mail* (2003).

17 However, Defendants had previously claimed that the BCL did not apply on various *other* grounds, all of which the Court rejected in summary judgment rulings.

referred in connection with their resistance to the Fifth Motion To Compel. 9/20/10 Ruling at 2. Thus, that ruling had the effect of limiting the universe of contested programs. This limited universe of disputed programs included programs for which Defendants had provided benefit grids in response to Plaintiff's Fourth Set of Interrogatories to Vertrue; programs for which the annual fee is less than $50 per year (the "fifty dollar exemption"); all monthly memberships;[18] and memberships sold prior to the effective date of the BCL. *See* Pl.'s Ex. 566; Att. IV to Plaintiff's Fifth Motion to Compel, filed 8/26/10. The Court explicitly ruled that "any other programs of defendant are covered by the BCL." 9/20/10 Ruling at 2.

Although the 9/20/10 Ruling established the universe of disputed programs for purposes of determining BCL coverage, and although Defendants never asked the Court to rescind or modify its ruling, Defendants later amended their discovery responses in order to expand that universe. The State argues that the Court should reject Defendants' effort to go beyond the Court's 9/20/10 Ruling by expanding the universe of disputed programs. However, the Court concludes that Defendants should be permitted to amend their discovery responses in order that the Court make a determination on the merits of whether individual programs fall within the purview of the BCL. Strictly following the 9/20/10 Ruling would in effect result in a too onerous sanction for Defendants' failure to comply with the Court's rulings.

At the remedies trial, the Court received into evidence the benefit grids to which the Court referred in its 9/20/10 Ruling (Pl.'s Ex. 566), as well as other evidence relating to the programs in dispute. Such other evidence included information regarding program(s) subject to the fifty dollar exemption (*see* 11/14/08 Wallin Aff., Att. 14, pp. 12, 16-17; Pl.'s Exs. 278, 613)

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18 Defendants' claim that all monthly memberships are excluded from BCL coverage may be disregarded for present purposes, because this claim was rejected by the Court in its summary judgment rulings.

and data adjusted to exclude sales of programs that occurred before July 1, 1993 (the effective date of the BCL). *See* Pl.'s Ex. 613.

The BCL applies to memberships in programs that offer the consumer a "plan . . . entitling the [consumer] to purchase merchandise, materials, equipment, or service, either from the issuer or another person designated by the issuer, either under a franchise or otherwise, whether it be at a discount, at cost plus a percentage, at cost plus a fixed amount, at a fixed price, or on any other similar basis." Iowa Code § 552A.1(3). Memberships in Defendants' discount (lifestyles) programs are subject to the BCL because these programs are, at their essence, plans entitling members to purchase items at discounted prices. For the reasons set forth below, however, memberships in Defendants' financial/privacy and health programs are not subject to the BCL.

Defendants' financial/privacy programs offer consumers access primarily to credit reports, credit scores, and credit monitoring. "The primary benefits [of Defendants' financial privacy programs] are access to credit information and credit monitoring [of] your report and sending you alerts if anything should change with those reports." 10/26/10 Tr. at 137 (B. Douglas). These are services and benefits delivered directly to program members. They do not fall within the BCL's coverage of a "membership," which is limited to a buying club's provision of a "plan" entitling members to purchase merchandise or services at special pricing. Iowa Code § 552A.1. A typical financial services/privacy program is the Privacy Matters 123 program, which provides the following benefits:

- Triple Bureau Credit reports and credit scores, and a Social Security report (10/26/10 Tr. at 138 [B. Douglas]).
- Triple Bureau Daily Credit Monitoring: "That is where the products will monitor all three credit bureaus and send alerts to the consumer, to the members, if there's any change to their status within the credit report or credit score" (*id.* at 138-39).

- Kroll Fraud Solutions: "That is a service that helps you, if you are a victim of identity theft, to have that identity restored to you" (*id.* at 139).
- ID Consultation Service: "That is a service where you can call a representative at Kroll and kind of work with someone on a consultative basis to help answer any questions you may have and also in terms of the restoration aspect" (*id.*).
- Identity Theft Insurance: "This is insurance against the fact that if you are the victim of identity theft, you can get your money back, up to $225,000, including legal fees" (*id.* at 139-40).
- Locksmith Rebate: "This is you get money back . . . if there's kind of a break-in to your house, in order to cover the locksmith costs associated with that" (*id.* at 140).
- Lost Key Return Service (*id.*).
- Your Family Records Organizer CD-ROM: "That is a service brought to you by Kiplinger's that allows you to keep a lot of your personal information stored in one place so in case you are a victim of identity theft, . . . you can recover your identity because you have information that would be important for working with the service to help you recover your identity" (*id.* at 141).
- Learning Center Resources: "That's basically on our web site we have various articles and information that you can access to help you just learn more about how to avoid being a victim of identity theft and manage yourself in an intelligent manner" (*id.* at 141-42).

The benefit package described above for the Privacy Matters 123 program is typical of the financial/privacy programs offered by Defendants. *Id.* at 142 ("All of [the financial/privacy programs] are designed in a similar vein."); *see* Ex. 566 (benefit grids of all programs, including the financial/privacy programs).

Although some of the financial/privacy programs offer one or more discounts as an "extra" or "member perk," their primary benefits are not discounted goods or services, and the programs are not marketed as discount programs. *See* 10/26/10 Tr. at 137 ("Q: Mr. Douglas, has Adaptive ever presented its financial privacy programs as discount programs? A: No, they have not."); *see also id.* at 140-41 (B. Douglas testifying that, as an example, the *Privacy Matters 123* program allows members to claim a 15% discount on the purchase of computer security software). While Plaintiff concedes that programs that offer no discounts on any merchandise or services are not subject to the BCL, it contends that any of the financial/privacy programs that

offer one or more discounts are subject to the BCL. The Court disagrees. Such a broad reading of the BCL could encompass entities that cannot reasonably be considered buying clubs such as bar associations, the AARP, the AAA (auto club) and many others. Defendants' memberships programs are subject to the BCL only if their primary benefits – the "plan" that members buy – are discounts on goods or services. Ancillary benefits giving members some discounts apart from the basic membership plan do not transform the memberships into ones falling under the BCL. Therefore, based on the Court's review of the features of the financial/privacy programs in evidence (Ex. 566), the Court concludes that the marketing of memberships in Defendants' financial/privacy programs are not subject to the BCL. These memberships sold after July 1, 1993 generated $7,330,165 in membership fees (Ex. TB).

Also, Defendants' health programs offer members access to a network of health providers (physicians, dentists, pharmacists) that offer services and products at negotiated rates. *See* 10/26/10 Tr. at 142 (B. Douglas). From the consumers' perspective, these programs are similar to an HMO or PPO, and it is not logical to ascribe to the legislature the intent to subject these kinds of health care provider discount plans with negotiated prices to the specific requirements of the BCL. Therefore, sales of memberships in Defendants' health programs sold after July 1, 1993 (Ex. TB, totaling membership fees of $3,862,073) are not subject to the BCL.

As to the fifty dollar exemption, the parties have conflicting positions. Plaintiff contends that the only program that falls within this exemption is Pharmacy Gold Card (RXM), which involves only $2,865.00 as the net total of payments for the relevant period. *See* 11/14/08 Wallin Aff., Att.14 (Sworn Statement of Douglas Weiss); Pl.'s Exs. 278, 613. However, Defendants submitted testimony and exhibits indicating that the net total for all programs that were ever offered for $50 or less during the relevant period was $2,152,871.66. *See* 10/26/10 Trial Tr. at

229-30; Defs.' Ex. SY. Given Mr. Rattigan's testimony, it appears that Defendants' figure is more comprehensive, as it includes programs that involved charges of only about $1 a month by virtue of having been bundled with more expensive programs. Although Defendants' Exhibit SY does not break out the underlying data, but rather sets forth a total sum, making it impossible to verify its accuracy, for present purposes the Court will use Defendants' dollar figure in applying the BCL's $50 exemption.

As to the BCL's July 1, 1993 effective date, that factor is best applied by ensuring that any data upon which the Court relies in determining remedies is limited to memberships that began on or after that date. *See* Pl.'s Ex. 613. In their proposed ruling, Defendants urge that any recovery for reimbursement under the BCL is limited to five years, because the five year statute of limitations (Iowa Code § 614.1(4)) applies. However, a statute of limitations does not run against the State unless specifically provided by the statute. *See Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d 163, 168 (Iowa 2006). The fact that the State is seeking reimbursement for consumers does not convert the suit into a private action, subjecting the claim to a limitations period. *See People ex rel. Hartigan v. Lann*, 587 N.E.2d 521, 524 (Ill. Ct. 1992).

Defendants have also argued that the doctrines of laches and/or equitable estoppel should preclude the State from seeking damages because the State failed to seek earlier enforcement against Vertrue, and because it did not seek to enforce the BCL against defendants' competitors. These equitable defenses are not available against the State. *See Fennelly, supra.* Furthermore, defendants have failed to establish the elements necessary for such defenses, even if they could be used against the State.

Finally, Vertrue argues that a reimbursement order that extends to memberships pre-dating May 12, 2001 would violate defendants' due process rights, because such an order would

in effect revive already barred individual causes of action, citing *Wiley v. Roof*, 641. So.2d 66, 68 (Fla. 1994) and *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. 1993). However, these two cases are inapposite. Both cases involved the resurrection of private causes of action involving sexual abuse. In neither case was the State a party. Defendants' argument ignores the fact that there has never been a statute of limitations applicable to the State, and thus no cause of action has been resurrected here.

The State takes the position that it is entitled to full reimbursement of all membership fees for every Vertrue program found to be in violation of the BCL. In support of its position, the State starts with Iowa Code § 522A.5(1), which provides that a violation of Chapter 522A is also a violation of § 714.16. The State further cites *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 770-71 (Iowa 2004) as authority for the proposition that it need not prove the elements of common law fraud for violations of the BCL in order to force complete reimbursement or disgorgement. The Court disagrees.

State ex rel. Miller v. Pace does indeed stand for the proposition that the consumer fraud statute, Iowa Code § 714.16(2)(a), is not a codification of common law fraud principles. *Id.* However, the case does not discuss the remedies portion of the statute, Iowa Code § 714.16(7). That section contains the following language:

> Except in an action for the concealment, suppression, or omission of a material fact with intent that others rely upon it, it is not necessary in an action for reimbursement or an injunction, to allege or to prove reliance, damages, intent to deceive, or that the person who engaged in an unlawful act had knowledge of the falsity of the claim or ignorance of the truth.

The Iowa Supreme Court originally held that the State was not required to prove reliance and/or damages under the CFA. *See State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 620-21 (Iowa 1989). However, the *Hydro Mag* case was decided under an earlier version of the CFA

which did not contain the above-quoted language. *See* Iowa Code § 714.16(7) (1987). The statute was amended in 1994 to include the above-quoted language. As a consequence, the Court concludes that the State must prove reliance and/or damages in order to claim either reimbursement or injunction relief not only under the CFA but the BCL when the basis of the suit is concealment or omission of a material fact. The breach of the BCL here, as urged by the State and found by the Court, is that Vertrue failed to comply with the requirements of the Door-to-Door Sales Act, Iowa Code Chapter 555A, by failing to advise consumers of their right to cancel as required by Chapter 555A. Such violation is by definition a concealment or omission; there is no evidence that any Vertrue representative ever made an affirmative representation to a consumer that Chapter 555A was inapplicable to sales of Vertrue membership programs.

It is obviously very difficult for the State to quantify reliance and/or damages in a situation such as the marketing program developed by Vertrue. In effect, the State must establish how many of the consumers who signed up for Vertrue programs would have cancelled if they had been properly advised of their right to cancel in compliance with the BCL. It was obviously not feasible for the State to call as witnesses the hundreds of thousands of Iowa customers who purchased memberships to testify that they would have cancelled had they been properly advised of their right to do so.

Vertrue has argued throughout that it offered consumers a greater right to cancel than required by the Door-to-Door Sales Act and the BCL, and thus the consumers it retained must have wanted to remain members. Such argument is completely unpersuasive in light of the fact that a majority of Iowa consumers were never even aware of their memberships. The fact so many Iowans remained as members is a tribute to the stealthy marketing program of defendant and not to informed choices by the consumers. Defendant's own expert, Dr. Thomas Maronick,

testified at the original trial that his surveys, commissioned by Vertrue, showed that 95% of Iowa consumers would cancel their memberships if Vertrue were required to comply with the BCL for its membership discount programs.[19]

It is certain that Iowans relied on the concealment and omission by Vertrue, and were damaged by the concealment and omission. Only the exact amount of the reliance and damage is uncertain. Where a party has established damages, but the amount of those damages is uncertain, the judge or jury may allow recovery where the record provides a reasonable basis from which the amount of damages can be approximated. *Field v. Palmer,* 592 N.W.2d 347, 353 (Iowa 1999). Even if it is difficult to ascertain the amount of damages with any precision or certainty, that alone is not a basis for denying recovery. *Bangert v. Osceola County,* 456 N.W.2d 183, 190 (Iowa 1990). Damages should not be denied as long as there is evidence that some damages were sustained. *Palmer v. Albert,* 310 N.W.2d 169, 174 (Iowa 1981). Based upon the record evidence, the Court finds that 90% of the consumers who purchased Vertrue membership discount programs would have cancelled those programs within the statutory three-day period had they been properly and conspicuously advised of their right to cancel as required by the BCL.[20]

The Court finds that, for the programs that were covered by the BCL at the time they were marketed, an award of reimbursement is appropriate in the net amount that Defendants acquired by means of the non-BCL-compliant solicitations. This "net total" consists of all payments made by Iowa consumers for those programs, less the portion of that sum Defendants

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[19] Dr. Maronick's opinion was predicated upon "compliance" meaning an in-person meeting between the consumer and a Vertrue representative, either at the consumer's home or a nearby store. While the Court does not agree that such an in-person meeting would be required, the Maronick surveys are persuasive evidence that Iowans did rely on the concealment and omission by Vertrue, and were damaged by the concealment and omission.

[20] As the Court set forth in its Liability Ruling, consumers have a responsibility to read the "fine print." However, a legislature may rationally conclude that precisely because of that responsibility marketers may be required to given heightened notice of their right to cancel membership programs, just as the BCL requires in Iowa.

have already refunded. Because the Court has determined that all programs marketed in Iowa were subject to the BCL except to the extent that one or more of the programs in the disputed subgroup are properly excluded, the net total is best calculated by taking the entire amount paid by Iowans for any and all memberships in programs with inception dates on or after July 1, 1993, and then subtracting the payments associated with the non-covered memberships. The calculation is as follows:

Total net payments for memberships with inception dates on or after 7/1/93 (Pl.'s Ex. 613):	$ **38,584,081.39**
Total net payments for memberships properly excluded as set forth above	$ **13,345,109.66**
Net total to be awarded as reimbursement/disgorgement:	$ **25,238,971.73**
x 90%:	$ **22,715,073.65**

Defendants argue that they are entitled to an equitable adjustment downward of any restitution or disgorgement order because they are the first entity to be sued under the BCL since it was amended in 1993, none of its competitors have been forced to comply with the BCL and it reasonably relied on the lack of enforcement by the State over the past seventeen years. None of these arguments are persuasive. There is no evidence as to when the State first discovered the nature and extent of Defendants' violations. As set forth above, not all of Defendants' programs violated the BCL. There is no way to determine what programs, if any, of Defendants' competitors violated the BCL. Finally, there is no for the Court to determine why the State may have reached settlements with other defendants in similar cases. A host of factors in other cases may have led the State to abandon claims under the BCL or to determine the BCL was inapplicable.

Civil penalties for BCL violations

As previously noted, the Court looks to the CFA for the remedies available for violations of the BCL. Iowa Code § 552A.5(1). The CFA provides that the Court may impose a civil penalty not to exceed forty thousand dollars per violation against a person found to have engaged in a method, act, or practice declared unlawful by the Act. Iowa Code § 714.16(7). The Court's Liability Ruling found that Defendants are liable for violating the BCL; that the marketing scheme that violated this law was sustained (lasting some twenty years); that the violations were widespread and systematic (as opposed to isolated or occasional violations resulting from inadvertence or accident); and that the offending conduct caused substantial harm to a very large number of Iowa consumers (over 500,000 memberships).[21] The Court further finds that there is a pronounced need to deter future violations on the part of Defendants and on the part of other entities engaged in similar marketing practices, and that Defendants have the ability to pay substantial civil penalties. *See* 9/20/10 Ruling at 5; Pl.'s Exs. 391-97. Therefore, a substantial civil penalty should be imposed against Defendants, for each designated violation.

The CFA does not specify what constitutes a separate violation for purposes of imposing a civil penalty, other than to state that a course of conduct shall not be considered to be separate and different violations merely because the conduct is repeated to more than one person. The course of conduct at issue in this portion of the Court's ruling is Defendants' continual sale of memberships in discount programs without compliance with the BCL. Consequently Defendants argue that only a single civil penalty, in the maximum amount of $40,000, can be assessed by the Court for their non-compliance with the BCL. The Court does not agree. What the statute says is that a course of conduct shall not be considered to be separate and different violations **merely** because the conduct is repeated to more than one person. What Defendants have done is to

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21 *See* Pl.'s Ex. 613.

market hundreds of programs to hundreds of thousands of Iowans without compliance with the BCL.

As the Court has discussed above, not all of Defendants' programs are required to comply with the BCL. However, most of them are required to comply and Defendants have chosen not to do so. By the Court's calculation, Defendants marketed 161 membership discount programs to Iowans after 1993 in violation of the BCL, resulting in 639,721 memberships. The Court rejects Defendants' assertion that the legislature intended by the language quoted above to state that the violation of the BCL can only result in the same maximum civil penalty as the marketing of one membership discount program to a small number of consumers. Had the legislature intended such a result, it could easily have so stated. The choice of language by the legislature gives proper discretion to the courts to make the civil penalty commensurate to the offense(s).

The State asserts that a separate civil penalty may be imposed for each membership program found to have been marketed to Iowans in violation of the law. A second consideration for the Court is the fact that the violations occurred not over a short period of time but rather over many, many years. A third factor for the Court is that some of Defendants' membership programs impacted far more Iowa consumers than others. Some programs were sold to a large number of Iowans and extracted millions of dollars through repeated billings, and other programs enrolled fewer Iowans and involved lesser sums. The Court finds that a graduated set of civil penalties, reflecting the differing impacts on Iowans, is reasonable and just, in the total amount of $2,200,000.00, as follows:[22]

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22 The attached Civil Penalty Schedule, the contents of which are derived from Pl.'s Ex. 613, identifies the programs in question. The Court has redacted from Plaintiff's proposed civil penalty chart those programs which the Court concluded were not covered by the BCL as discussed above.

a. Defendants unlawfully marketed seventeen (17) different membership programs to Iowans which yielded more than 10,000 memberships each, grossing $28,068,117. A civil penalty of $40,000.00 for each of these programs is appropriate, totaling $680,000.00.

b. Defendants unlawfully marketed fourteen (14) different membership programs to Iowans which separately yielded more than 5,000 (but fewer than 10,000) memberships, grossing $5,485,300. A civil penalty of $30,000.00 for each of these programs is appropriate, totaling $420,000.00.

c. Defendants unlawfully marketed thirty-seven (37) different membership programs to Iowans which separately yielded more than 1,000 (but fewer that 5,000) memberships, grossing $7,506,800. A civil penalty of $20,000.00 for each of these programs is appropriate, totaling $740,000.00.

d. Defendants unlawfully marketed thirty-eight (38) different membership programs to Iowans which separately yielded more than 100 (but fewer than 1000) memberships grossing $1,004,728. A civil penalty of $10,000.00 for each of these programs is appropriate, totaling $380,000.00.

Although civil penalties could also be imposed on each of the other fifty-six (56) programs Defendants marketed to Iowans, the Court finds that the above-described civil penalties adequately serve the objectives of civil penalties under applicable law. The Court further finds that the total civil penalty should be imposed jointly and severally against all Defendants, rather than making each Defendant separately liable for the entire amount.[23]

REMEDIES FOR VIOLATIONS OF THE CONSUMER FRAUD ACT

Injunctive relief for CFA violations

The Liability Ruling found that Defendants violated the CFA in several respects. Having found that Defendants are liable for violating the CFA, Defendants are to be permanently enjoined from engaging in the offending conduct in the future. In addition, Defendants are to be

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[23] Plaintiff has argued that the CFA permits a civil penalty to be levied against each Defendant separately, however, because the Liability Ruling found a "blurring ... of corporate identities" supporting liability against all three defendants, the Court deems it appropriate to assign liability for the civil penalties consistent with that approach. *See* Liability Ruling at 20.

enjoined from further billing of Iowa consumers for memberships that were created in violation of the CFA.

Restitution and disgorgement for CFA violations

Although the Liability Ruling identified several ways in which Defendants' marketing of memberships in Iowa violated the CFA, Plaintiff has chosen to focus on some of those ways, and not others, in establishing restitution. Plaintiff has asked the Court to base its CFA restitution award on the violations associated with direct mail marketing, telemarketing scripts, and Internet bundling. Plaintiff also identified the double breakage practice as a separate and independent source of restitution, but because it cuts through all marketing channels and poses double recovery issues, the Court will initially focus the restitution award by marketing channels.

Restitution for unlawful direct mail marketing

The Liability Ruling found that all of Defendants' check mailers and gift card mailers violated the CFA. Liability Ruling at 47. Based on the evidence presented at the remedies trial, the Court now finds that, for all practical purposes,[24] all of Defendants' membership marketing conducted through the direct mail marketing channel consisted of check mailers and gift card mailers, and therefore all such transactions violated the CFA.

The evidence shows that Defendants acquired net total membership payments (gross membership payments less total refunds) of $1,353,724.43 by means of direct mail solicitations

24 Defendants evidently engaged in a third form of direct mail marketing through the use of "bang tails." However, according to Defendants this occurred only "on a test basis in or about 2001" and "[t]here is no way of determining which Iowa consumers, *if any*, enrolled in a program as a result of a bang tail solicitation." Pl.'s Ex. 562 at 4 (emphasis added).

directed to Iowans,[25] and $1,353,724.43 is awarded as restitution for CFA violations relating to direct mail. *See* Pl.'s Ex. 618.

Defendants argue *inter alia* that an award sufficient to reimburse all direct mail customers would be unwarranted, as almost 10% of memberships created through direct mail involved trackable benefit usage. *See* Defs.' Ex. TF. The Court declines to make any adjustment on this basis. Defendants have presented no evidence regarding the extent, timing, or nature of any alleged benefit usage by any consumer, or by consumers in general. *Id.*; *see also* 10/26/10 Trial Tr. at 223-25; Liability Ruling at 33-34. A given consumer, prompted by his or her discovery of the membership after years of unauthorized and unrecognized charges, might make an isolated effort to derive some benefit from the membership before canceling. That circumstance would hardly warrant a complete denial of reimbursement for acts that this Court has expressly found to be deceptive and unfair. Indeed, the CFA declares such acts to be unlawful "whether or not a person has in fact been ... deceived." Iowa Code § 714.16(2)(a).

Restitution for unlawful telemarketing

Although the Liability Ruling found Defendants' telemarketing transactions unlawful on both context and content grounds,[26] Plaintiff has focused its efforts in the remedies phase on content-based violations that can be identified through telemarketing scripts.[27]

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25 Although the Court may not always be explicit on this point, all references to remedies herein are limited to transactions involving Iowa residents.

26 *Context*-based features relate to the manner in which a telemarketing pitch is delivered. Liability Ruling at 54. *Content*-based features relate to the content of the presentation.

27 This content focus, which Plaintiff argues was borne of practical necessity in light of the resources that would be required to review more than two million recordings for context violations (*see* Defs.' Post-Trial Brief on Remedies at 42), benefits Defendants in that they will not be required to account for the context-based violations (of which the Ackelson recording is but one example) which an exhaustive review of recordings would presumably bring to light.

The Liability Ruling found the content of Defendants' telemarketing presentations to be unfair and deceptive on several different grounds. Liability Ruling at 56-58. These included the "thank you" ploy, the "we're sending you" approach, assurances that a transaction is "risk free" despite Vertrue's "having affirmatively taken actions to deceive consumers,"[28] and a structure in which an unbroken recitation of terms, conditions, and putative benefits leads to a single "okay" that purports to authorize months or years of charges for memberships – memberships that for the vast majority go unused. *Id.* at 57.

Exhibit 620 summarizes Plaintiff's effort to review telemarketing scripts that either party relied upon in the liability phase,[29] and to identify the programs that were telemarketed through scripts that had features the Court had held to be unlawful. Exhibit 621a sets forth the reimbursement associated with the programs telemarketed through scripts that contained most or all of the features the Court found to be unlawful.

The Court acknowledges that the approach to reimbursement reflected in Exhibits 620 and 621a is necessarily imprecise. The imprecision results, however, from factors within Defendants' control. *See Febre*, 128 F.3d at 535 (shifting the burden to ensure that the risk of uncertainty falls on the wrongdoer). Defendants have now asserted that they employed a varying assortment of different scripts, and that particular scripts cannot be confidently matched to particular sales transactions. *See generally* 10/26/10 Trial Tr. at 155-56. Under the

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28 In the Liability Ruling the Court concluded that the use of "risk free" in any marketing materials violates the CFA "in those circumstances where Vertrue has affirmatively taken actions to deceive consumers." Liability Ruling at 44. The Ruling provided two examples of such affirmative deceptive actions at that juncture, and separately found "risk free" in telemarketing to be misleading in the context of the "thank you" and "we're sending you" ploys. *Id.* at 57.

29 These included scripts that were offered into evidence by either party, as well as Ex. 591 (Cutler Deposition Ex. 9), the scripts relied upon by defense expert Barry Cutler (*see* 11/25/09 Liability Trial Tr. at 185; Court Ex. 22). Exhibit 591 was offered into evidence at the remedies trial.

circumstances, and given the exemplar representations discussed above, Plaintiff's approach to calculating reimbursement based on offending telemarketing scripts is reasonable, and the burden shifts to Defendants to establish otherwise. *See* the *FTC v. Febre* line of authority, discussed *supra*. Defendants have failed to carry that burden.

Defendants object that the scripts relied upon by the parties at the liability phase, and thus used by Plaintiff in its analysis of script content (Ex. 620), were predominantly West scripts.[30] However, the Court has already determined that Defendants cannot evade responsibility for West's telemarketing of Vertrue memberships. The Liability Ruling expressly found that Defendants selected West, supplied the script templates, actively participated in crafting the script variations, and performed other crucial functions: "Vertrue developed the business model for telemarketing its memberships, and West plugged into that existing model in a limited way." Liability Ruling at 23.

Defendants also object that Exhibit 620 covers not only features that the Liability Ruling identified ("Thank You," We're Sending," and "OK?"), but also such features as "Premium," "Double Breakage," and "Risk Free." At worst, such inclusion would be superfluous. In fact, however, the additional information is helpful to the Court. The notation of a premium relates to other liability findings regarding the script (*e.g.*, what it is that "we're sending" as a "thank you"). The existence of a double breakage feature in the transaction vis-à-vis the premium being offered shows the extent to which the most indefensible breakage practices were layered upon objectionable scripts.[31] Similarly, the term 'risk free' was identified in the Liability Ruling as

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30 "West" refers to the three West companies, formerly co-defendants in this cause, that were involved in telemarketing some of Defendants' memberships.

31 As noted below, double breakage serves as an independent basis for restitution.

unlawful when coupled with other affirmatively deceptive actions, and so it is instructive to examine the extent to which that term was used in tandem with other misleading devices.

In addition, Defendants argue that some scripts reflected in Exhibit 620 are shown as having only one objectionable feature, specifically the "OK?" structure. Of the 91 scripts analyzed for purposes of Exhibit 620, only 8 indicate that the "OK?" feature was unaccompanied by the "Thank You" or "We're Sending" feature, and, of those eight, all but one[32] involved "Risk Free" or "Double Breakage" (or both). Moreover, the example the Defendants put forward as a purportedly harmless instance of the "OK?" approach (Exhibit AQ) lends little support to their position. Exhibit AQ involves a telemarketer holding out a "FREE $50 Wal-Mart Gift Card" (that can be claimed "as a member of Galleria") as part of an unbroken 240-word barrage of benefits, terms, and impending charges, all leading to: "Okay?!"

Defendants also contend that in the Liability Ruling the Court applied its script content analysis only to *inbound* telemarketing, and that the Court found a violation of law only if all features identified as misleading were combined in a single transaction. Defs.' Post-Trial Br. on Remedies at 55. This mischaracterizes the Liability Ruling. That ruling was explicit in stating that its analysis of content defects, "coupled with the ample evidence that consumers were in fact deceived and suffered losses as a result, render Vertrue's telemarketing of memberships, *both outbound and inbound*, deceptive and unfair." Liability Ruling at 57 (emphasis added). Moreover, the Liability Ruling did not establish a threshold, requiring that all defects be contained in a single sales pitch in order to trigger a violation. Indeed, the Liability Ruling expressly found some features deceptive in and of themselves (*Id.* at 57, stating that the "'thank

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32 The only script reflected on Exhibit 620 that involved the "OK?" structure isolated from other objectionable features was on page 1 (Pl.'s Ex. 591, MW 532-533).

you' is false, and is therefore another deceptive feature," and that the 'OK?' structure "is more likely to mislead than inform"), and that other features were deceptive in combination with *any* other deception (*Id.* at 57, noting the misleading use of 'risk free' in connection with a consumer's passive acquiescence to the 'we're sending you' ploy). In addition to identifying such elements, alone and in combination, this Court addressed the overall effect: "Moreover, consumers are deceived by the net impression created by these solicitations." Liability Ruling at 57.

On balance, Plaintiff's effort to apply this Court's rulings regarding unlawful contents of scripts is reasonable under the circumstances. Any deficiencies are isolated and of little consequence, and do not serve as a basis for rejecting an otherwise reasonable effort. Plaintiff has met its burden of showing the extent to which Defendants' telemarketing scripts suffered from the deceptive and unfair features identified in the Liability Ruling.

The evidence shows that Defendants acquired total net membership payments of $16,558,285.00 by means of the above-described unlawful telemarketing solicitations directed to Iowans.[33] However, only $1,330,146.00 of this amount has not already been ordered reimbursed under the BCL portion of this ruling. Thus, $1,330,146.00 will be awarded as reimbursement for CFA violations relating to such telemarketing solicitations.

Reimbursement for unlawful Internet transactions

The Liability Ruling found several aspects of Defendants' Internet marketing to be objectionable, and identified several independent ways in which such marketing constituted an unfair and deceptive practice. Liability Ruling at 50-53. Plaintiff has focus on reimbursement based on the practice of "bundling" programs, i.e., the creation of "a multi-step process to cancel

33 *See* Pl.'s Ex. 621a. This sum is based only on those 16 specific programs shown in Ex. 620 to have been telemarketed through the use of unfair and deceptive scripts.

multiple programs which the consumer is obligated to purchase in one transaction." *Id.* at 53. At the hearing on the Fifth and Sixth Motions to Compel, counsel for Defendants explained how bundled programs can be identified through the consumer transaction database. Following these instructions, Plaintiff has segregated bundled transactions by identifying the instances in which programs involved a membership fee of $1.00. *See* Pl.'s Ex. 623.[34] All programs sold in this manner had to be cancelled separately, and were therefore bundled programs giving rise to remedies.

Plaintiff contends that reimbursement should embrace all revenues generated through unlawful bundling (to the extent refunds have not already been made), as opposed to a more limited reimbursement order focusing only on the $1.00 payments. Plaintiff argues that this approach is consistent with the Liability Ruling's finding that "the Internet marketing" violates both the CFA and the FTC Act when a consumer is "obligated to purchase in one transaction" programs that must be cancelled separately. Liability Ruling at 53.

The Court agrees, since the unlawful practice of "bundling" affected both of the bundled programs, and the total sum "acquired by means of" this unlawful practice (in the operative language of the CFA)[35] is the amount of membership payments derived from bundled programs, less prior refunds. Exhibit 623 shows the total net revenues generated through bundled programs not the subject of reimbursement under the BCL portion of the ruling, namely $1,332,723.11, and that amount is awarded as consumer reimbursement.

Reimbursement for unlawful double breakage

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34 As part of Defendants' foundation objection to Exhibit 623, Defendants argued that Mr. Hugg was unable to state on cross examination how the numbers were produced (citing 10/26/10 Trial Tr. at 107-08). However, the record shows that this potential defect was adequately cured on re-direct. (*See* 10/26/10 Trial Tr. at 110-11.)

35 Iowa Code § 714.16(7).

The reimbursement amounts noted above under CFA violations do not pose any double recovery issues, as each marketing channel is independent of the others. The Liability Ruling, however, found that various aspects of Defendants' breakage practices, which cut across the marketing channels, were unfair and deceptive. Liability Ruling at 37-41. This included the finding that some forms of single breakage violated the CFA, depending on the circumstances, but that double breakage was particularly egregious. *Id.* at 38. Transactions that involved double breakage suffered from all of the objectionable aspects of breakage described in the Liability Ruling, and all such transactions give rise to remedies, as a separate and independent source of CFA violation. In an effort to streamline the calculation of reimbursement associated with unlawful breakage, Plaintiff has focused only on double breakage. However, Plaintiff acknowledges that a reimbursement recovery for double breakage would involve some degree of double recovery, overlapping with reimbursement associated with direct mail, telemarketing and Internet channels noted above. Because the Court is awarding the reimbursement amounts sought by Plaintiff under those marketing channels and must avoid double recovery, it may not be vital that the reimbursement amount stemming exclusively from double breakage be ascertained. The Court will nevertheless determine the reimbursement amount associated with double breakage, given potential issues on appeal and because that determination affects other aspects of the ruling.

Defendants have relied heavily on premiums to lure consumers into trial memberships that ultimately led to months or years of charges. Defendants' use of double breakage in connection with those premiums taints the transactions, and does so whether or not the consumer in a particular instance managed to obtain the premium. After all, such consumers were deceived as to the ease of obtaining the premium; they had to persevere in overcoming

intentional breakage barriers; and in many instances they undoubtedly paid more in membership fees than the premium was worth. *See, e.g.*, Pl.'s Exs. 13, 190. Indeed, only 5.5% of Iowa memberships actually redeemed any premiums. Pl.'s Exs. 612, 626. The Court finds that in transactions that involved double breakage premiums, any and all membership payments that followed the offer of a premium were "acquired by means of a practice declared to be unlawful by [the CFA]."

The question of reimbursement and/or disgorgement for the collections of double breakage premiums poses a separate problems from the other practices discussed above as violations of the CFA. The reason that the double breakage practice was so objectionable was that defendant's methodology for the redemption of premiums was hidden from consumers. Consumers purchased products with the understanding that they were "risk free" but yet with the promise of a premium of some sort. They had no way of knowing that Defendants' would delay the premium redemption process so as to collect membership dues than the premiums were worth, even if they understood the condition that they had to be active members at the time the premium was redeemed.

As should be evident from this discussion, Defendants' practice on double breakage premiums amounted to an omission or concealment of a material fact rather than an affirmative representation. Thus, as discussed above, the State was required to prove reliance by consumers in order to be entitled to reimbursement for this prohibited practice. The Court can find no evidence in the record upon which to make a finding of reliance, and to differentiate those consumers who were damaged by the concealment and omission. Furthermore, the Court can find no reliable method to separate those transactions involving double breakage from those for which the Court has already ordered reimbursement. Consequently, no reimbursement or

disgorgement award is made as a result of the double breakage practices of Defendants.

Civil penalties for CFA violations

The Liability Ruling identified several different ways in which Defendants violated the CFA through their marketing to Iowans. The following CFA violations were identified in that Ruling:[36]

1. Single breakage: "Even a single set of artificial hurdles, when employed solely as a breakage device to keep consumers from getting what they were explicitly led to expect, is deceptive and unfair ..." Liability Ruling at 38.

2. Double breakage: "[D]ouble breakage is even more egregious [than the above-described single breakage]." Liability Ruling at 38.

3. Surveys used to increase breakage: "[A] fake, make-work survey form [used] for the sole purpose of burdening the consumer to the point of abandoning the redemption effort ... is itself unfair and deceptive, in addition to being a component of the unfair and deceptive breakage scheme." Liability Ruling at 38-39.

4. Non-disclosure of premium limitations: "[A]ny limitations placed on the consumer's receipt of the premium would ... need to be unequivocally conveyed to the consumer from the outset. The failure to do so ... is unfair and deceptive." Liability Ruling at 39.

5. Inadequate disclosure of the active member requirement: Defendants "designed the process with built-in delays to ensure that it would collect more monthly dues than the value of the premiums..." Liability Ruling at 40. "Like the breakage hurdles themselves, this 'active member' requirement was not adequately disclosed." *Id.*

6. "Risk free" representations: Such representations "constitute violations in those circumstances where Vertrue has affirmatively taken actions to deceive consumers." Liability Ruling at 44 (identifying two such affirmative actions) and 53.

7. Check mailers: "The check mailers are misleading as to the fundamental nature of the transaction ..."[37] Liability Ruling at 47.

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36 Of course, the fact that no award of reimbursement is made in connection with particular CFA violations does not mean that no civil penalty should attach. Reimbursement calculations may be rendered unreasonably difficult by various practical considerations, but that should not prevent the imposition of appropriate civil penalties for violations the Court has found.

37 The Court observes in passing that check mailers and various other violations could be examined at a higher resolution, isolating for penalty purposes each separate deceptive and unfair feature identified in the Liability Ruling (*e.g.*, tiny print disclosures, mailings ostensibly from credit card issuers, and the device of enrollment by negotiating a check).

8. Gift-card mailers: "The gift-card mailers, likewise, are misleading as to the fundamental nature of the transaction ..." Liability Ruling at 47.

9. Misleading landing pages: "[T]he landing page is designed to look like a continued transaction with the initial marketer." Liability Ruling at 51.

10. Landing page surveys: "[T]he survey is a ruse, making the consumer think ... that the cash-back offer is a quid pro quo ..." Liability Ruling at 52.

11. Risk free premiums online: "[T]he Internet marketing does violate both laws when it offers 'risk free' premiums for programs where Vertrue deliberately delays the premiums ..." Liability Ruling at 53.

12. Online obstacles to premium redemption: "[T]he Internet marketing does violate both laws when it ... places obstacles to reduce or prevent premium redemption for no business purpose other than to maximize profits ..." Liability Ruling at 53.

13. Multi-step cancellation of one-click purchases: "[T]he Internet marketing does violate both laws when it ... creates a multi-step process to cancel multiple programs which the consumer is obligated to purchase in one transaction." Liability Ruling at 53.

14. Unintelligible telemarketing pitches: "Telemarketing pitches like the one Ms. Ackelson received ... explain how consumers have become enrolled ... but then have been unaware ... that they are being charged for unused memberships." Liability Ruling at 56.

15. "To thank you, we're sending you ... OK?": "The claim that any part of the transaction is intended as a 'thank you' is itself false, and is therefore another deceptive feature of the transaction, in and of itself .... The consumer is not so much asked to make a decision, as to passively acquiesce in a process that's already underway .... This approach is more likely to obscure than inform, and Vertrue improperly relies on such pitches as the basis for months or years of credit card charges for unused memberships. ... These features ... render Vertrue's telemarketing ... deceptive and unfair." Liability Ruling at 57.

The above-listed CFA violations were knowing and purposeful, and harmed hundreds of thousands of Iowans. The Court finds that there is a pronounced need to deter future such violations, on the part of Defendants and on the part of other entities engaged in similar marketing practices, and that Defendants have the ability to pay substantial civil penalties. *See Santa Rosa*, 475 N.W.2d at 219. Therefore, a civil penalty in the highest amount, $40,000.00,

should be imposed against Defendants, jointly and severally, for each designated violation, totaling $600,000.00.

ATTORNEYS' FEES AND COSTS

The CFA provides that the Attorney General is entitled to recover costs of the court action and any investigation which may have been conducted, including reasonable attorneys' fees. Plaintiff has submitted an application for attorney fees and costs, supported by affidavits, seeking attorney fees in the amount of $652,080.75; expert witness costs in the amount of $52,420.50; and reimbursement of miscellaneous litigation expenses in the amount of $20,738.80.

At the outset, the Court notes that the attorney fees sought are considerably less than what the Attorney General might reasonably seek:

> a) No attorney fees or costs have been sought for investigative or legal efforts prior to November 12, 2007, despite the fact that a great deal of work was clearly done on this matter before that date, including drafting and serving a Civil Investigative Demand (CID) upon MemberWorks; receiving and reviewing the response to the CID; conducting the survey of MemberWorks members; drafting and filing the Petition in this action; and considerable motion activity, including Defendants' motion to dismiss and Plaintiff's first motion for summary judgment.
>
> b) As shown in the application, no fees have been sought for several Department of Justice employees who participated in the investigation and/or litigation of this matter, as shown by the record.
>
> c) Plaintiff's attorney fee request extends only to October 21, 2010. Numerous additional hours, for which no compensation is being sought, have undoubtedly been spent by counsel for Plaintiff after that date, particularly in connection with the remedies trial on October 25-26, 2010, and post-trial submissions.

In any event, Defendants have indicated that they do not challenge the number of hours or the hourly rates Plaintiff has put forward. *See* Defendants' Response to State's Application for Attorney Fees and Investigative Costs at 1-2. However, Defendants have asked the Court to reduce Plaintiff's attorney fee award by 25% for "lack of success," arguing that the Court

rejected Plaintiff's attack on Defendants' overall business model. *Id.* The Court finds that no such reduction is appropriate. Plaintiff challenged numerous interrelated aspects of Defendants' marketing conduct, and enjoyed considerable success in doing so. The Court awards Plaintiff $652,080.75 in attorney fees.

Plaintiff also asks that Defendants be required to pay the fees and costs of Plaintiff's expert witness, Dr. Robert Meyer, in the total amount of $52,420.50. Dr. Meyer's hourly fee is $550.00, and Plaintiff has submitted a statement from Dr. Meyer indicating that he devoted 94.5 hours to consulting with Plaintiff, reviewing evidence and literature, drafting the necessary reports, being deposed, and attending and testifying at trial, and in addition incurred out-of-pocket costs of $445.50. Defendants have challenged Plaintiff's claim for recovery of Dr. Meyer's fees and costs on two grounds. First, Defendants have argued that such expert witness costs are not a cognizable cost of the action within the meaning of Iowa Code § 714.16(11). Second, Defendants assert that the State should not recover any expert witness expenses because the Court did not accept Dr. Meyer's testimony in the Liability Ruling.

Iowa Code § 714.16(11) provides that "the attorney general is entitled to recover costs of the court action and any investigation which may have been conducted, including reasonable attorneys' fees, for the use of this state." A recovery under this provision is mandatory, not discretionary. *State of Iowa ex rel. Miller v. Fiberlite*, 476 N.W.2d 46, 48 (Iowa 1991). Costs incurred in connection with expert testimony in complex litigation like the case at bar are recoverable under the broad language of Iowa Code § 714.16(11). *See GreatAmerica Leasing v. Cool Comfort Air Conditioning*, 691 N.W.2d 730, 732-33 (Iowa 2005) (holding that "certain litigation expenses" fall within "a reasonable attorney's fee" for purposes of Iowa Code §625.22, and citing cases in which expert witness costs were awarded). *See also* Iowa R. Civ. P. 1.508(6).

As to Defendants' second argument, that there should be no recovery because the Court did not accept the testimony, this argument too must fail. The Attorney General reasonably sought to present expert testimony as part of the evidence,[38] and that testimony was closely related to various successful claims. There is no basis for excluding expert witness fees from the costs Plaintiff may recover in this action.

The Court finds that total fees and costs in the amount of $52,420.50 to Dr. Meyer is reasonable, and should be included in the costs and fees Defendants are ordered to pay to Plaintiff.

Plaintiff further asks that Defendants be required to pay certain travel and other out-of-pocket costs incurred by Plaintiff in connection with depositions conducted in this litigation, and Plaintiff has submitted itemized records detailing those costs. The Court finds that such costs in the amount of $20,738.80 are reasonable, and should be included in the costs and fees Defendants are ordered to pay to Plaintiff.

INJUNCTIONS AND OTHER ORDERS

IT IS THEREFORE ORDERED pursuant to the Iowa Buying Club Memberships Law, Iowa Code Ch. 552A, and the Iowa Consumer Fraud Act, Iowa Code § 714.16, that each Defendant, and each Defendant's partners, employees, agents, servants, representatives, successors, assigns, and all other persons, corporations and other entities acting in concert or participating with each Defendant who have actual or constructive notice of the Court's injunction (hereinafter "Defendants et al."), are permanently restrained and enjoined from the following in connection with all transactions subject to the BCL: (A) violating the BCL; (B) without limiting the foregoing, failing to comply with all notice, disclosure, and other

38 Indeed, Defendants presented the testimony of two experts.

requirements of Iowa Code §§ 555A.1 through 555A.5 (incorporated by section 552A.3 of the BCL) and with all requirements relating to contracts set forth in Iowa Code §§ 552A.3 and 552A.4; and (C) without limiting the foregoing, from engaging in the following acts and practices:

1. Selling to Iowa residents buying club memberships, as defined in Iowa Code Ch. 552A, whether the sale is solicited through telemarketing, direct mail, online, or otherwise, without providing each buyer with a fully completed receipt or copy of any contract at the time of its execution, setting forth the date of the transaction and containing the name and address of the seller and the following statement:

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

Such statement shall be in ten-point (or larger) boldface type, and must appear on the front page of the receipt or immediately above the buyer's signature line on the contract.

2. From failing to furnish each buyer, at the time the buyer signs the contract or otherwise agrees to buy a membership, a completed form in duplicate which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point boldface type the following caption, information and statements in the same language as that used in the contract:

NOTICE OF CANCELLATION

.....

(enter date of transaction)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may if you

wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do not agree to return the goods to the seller or if the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to ....., (Name of seller) at ..... (Address of seller's place of business) not later than midnight of ..... (Date).

I hereby cancel this transaction.

..... **.....**
(Date) **(Buyer's signature)**

3. To the extent that a Defendant presents a contract for the consumer's signature by mail, courier, or any other means that does not involve instantaneous communication between seller and buyer, Defendant shall arrange for such further communication to occur as is necessary to ensure: (i) that the contract, as well as the Notice of Cancellation, accurately sets forth the date of the transaction; (ii) that the Notice of Cancellation sets forth a specific date not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation; and (iii) that the Defendant orally informs the buyer at the time the buyer signs the contract of the buyer's right to cancel.

IT IS FURTHER ORDERED pursuant to the Iowa Buying Club Memberships Law, Iowa Code Ch. 552A, and the Iowa Consumer Fraud Act, Iowa Code § 714.16, that Defendants et al. are permanently restrained and enjoined from charging, collecting, or receiving membership fees or costs from Iowa residents who were enrolled through a transaction that violated the BCL.

IT IS FURTHER ORDERED pursuant to the Iowa Consumer Fraud Act, Iowa Code § 714.16, that Defendants et al. are immediately and permanently restrained and enjoined from violating the CFA. Without limiting the foregoing, Defendants are ordered to refrain from the following acts and practices:

1. The use of the check mailers and gift card mailers determined to have constituted unfair or deceptive practices in the Ruling As To Liability, or substantially equivalent practices, including without limitation the practice of providing to a consumer, as part of an effort to sell a membership or other merchandise, a check which, if negotiated by the consumer, creates or purports to constitute any form of assent on the part of the consumer to assume an obligation, acquire an interest in a membership or other merchandise on a trial basis or otherwise, or be charged or billed for any purpose;

2. The use of telemarketing solicitation practices determined to have constituted unfair or deceptive practices in the Ruling As To Liability, or substantially equivalent practices, including without limitation the following:

a) The practice of delivering telemarketing solicitations at a speed or in a manner that would make it unreasonably difficult for the average consumer in the target population to understand the entire presentation.

b) The practice of structuring or conducting telemarketing solicitations for memberships in a manner that obscures the fact that an enrollment is being solicited, the terms of membership, the steps that must be taken to avoid credit card or other charges, or the consequences of the consumer's assent.

c) The practice of conveying to consumers that they are receiving a membership or other merchandise as a thank you or as a comparable show of gratitude, unless the membership or other merchandise is in fact provided as such a show of gratitude and is provided without any current or future cost or obligation.

3. The use, as part of an effort to sell a membership or other merchandise, of any form of consumer survey or questionnaire, if the primary purpose for using the survey or questionnaire is anything other than obtaining the information sought. Liability Ruling at 38-39, 51.

4. Offering, as an inducement to try or obtain a membership, a free gift card, a set of coupons, a savings bond, or other premium, unless such offer is accompanied, at the time the offer is made, by clear and conspicuous disclosure of all material facts associated with obtaining the premium, including without limitation a clear and conspicuous description of (a) each step involved in the process of obtaining the premium; (b) any conditions, limitations, or restrictions pertaining to such process; and (c) the amount of time typically involved in obtaining the premium.

5. The use, in connection with the marketing of memberships, of the term "risk free" (or its substantial equivalent) to describe a trial membership, if the transaction involves any affirmative actions to deceive consumers. Liability Ruling at 44.

6. The use, in connection with the marketing of memberships through the use of premiums, of the term "risk free" (or its substantial equivalent), if consumers are told they may receive the premium regardless of their membership status at the time the

premium is issued and Defendants employ a breakage model designed to ensure that more members' dues will be received than the value of the premium. Liability Ruling at 44.

7. The use, in connection with the marketing of memberships through the Internet, of the term "risk free" (or its substantial equivalent) in solicitations involving premiums, if obstacles are placed in the process of obtaining the premium to reduce or prevent premium redemption for no business purpose other than to maximize profits. Liability Ruling at 53.

8. The use, in connection with the marketing of memberships through the Internet, of the term "risk free" in solicitations involving premiums where any avoidable delay is imposed in the process of obtaining the premium. Liability Ruling at 53.

9. The use, in connection with the marketing of memberships through the Internet, of any form of solicitation that misleads consumers regarding what entity they are dealing with and/or what entity is sponsoring a website or a promotion appearing online. Liability Ruling at 51-52.

10. The use, in connection with the marketing of memberships through the Internet, of any mode of solicitation that involves the purchase of two or more memberships with a single click of the mouse, if such memberships must be cancelled separately. Liability Ruling at 53.

IT IS FURTHER ORDERED pursuant to the Iowa Consumer Fraud Act, Iowa Code § 714.16, that Defendants et al. are immediately and permanently restrained and enjoined from charging, collecting, or receiving membership fees or costs from Iowa residents who are likely to have been enrolled through a transaction that violated the CFA through one or more of the acts and practices prohibited in any part of the preceding paragraph.

IT IS FURTHER ORDERED that judgment be entered against Defendants, jointly and severally, in favor of Plaintiff, in the amount of $26,731,667.19, together with interest at the statutory rate of 2.27% from date of filing, to be applied by the Attorney General to restoring to Iowa consumers amounts they spent for Defendants' memberships to the extent reimbursement has not previously been made, pursuant to the BCL and the CFA (Iowa Code § 714.16(7)). Such restoration may include, in the Attorney General's discretion, such expenditures as are

reasonably necessary to retain the services of a third party to administer consumer reimbursement. Defendants are directed to accommodate reasonable requests from Plaintiff for customer data or other information required by Plaintiff to facilitate restoration. To the extent that consumers entitled to reimbursement cannot be located through reasonable efforts, the money that is not returned to consumers shall be awarded to Plaintiff to be used by the Attorney General for the administration and implementation of the CFA, pursuant to Iowa Code § 714.16(7), and shall be deposited into the fund created by Iowa Code § 714.16C (2009).[39]

IT IS FURTHER ORDERED that judgment be entered against Defendants, jointly and severally, in favor of Plaintiff, in the amount of $2,820,000.00 as civil penalties, pursuant to the BCL and the CFA (Iowa Code § 714.16(7)), together with interest at the statutory rate of 2.27% from date of judgment entry.

IT IS FURTHER ORDERED that judgment be entered against Defendants, jointly and severally, in favor of Plaintiff, for costs of the court action and any investigation which was conducted, including reasonable attorneys' fees, in the amount of $725,240.05, pursuant to the BCL and the CFA (Iowa Code § 714.16(11)).

IT IS FURTHER ORDERED that the Court retain jurisdiction for purposes of enforcing this Final Judgment.

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39 The dollar judgment ordered in this paragraph represents the total sum the Court found to be due as reimbursement/disgorgement in connection with BCL violations. This amount is separate from the reimbursement/disgorgement associated with CFA violations. If any portion of the BCL award were to be set aside on appeal and the CFA analysis affirmed, an appropriate award for reimbursement/disgorgement for CFA violations would have to be substituted for the award in this paragraph. Moreover, the total sum awarded is to be distributed to consumers in Plaintiff's discretion, consistent with this judgment and the CFA, without imposition of a required claims process.

IT IS FURTHER ORDERED that judgment be entered against Defendants, jointly and severally, for court costs, to be paid to the Polk County Clerk of Court, in the amount of $_____.

Dated this 7th day of March 2011.

ROBERT A. HUTCHISON, JUDGE
Fifth Judicial District of Iowa

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Civil Penalty Schedule
(Programs incepted after 6/30/93)

	PROD_CODE	Membership Count	Sum of Billings	Sum of Refunds	Sum of NET
1	ESS	86800	$6,642,494.98	-$2,979,957.31	$3,662,537.67
2	ENT	77378	$5,791,784.61	-$2,843,712.17	$2,948,072.44
3	SPT	30781	$2,319,207.41	-$1,129,264.53	$1,189,942.88
4	BBX	26264	$147,299.35	-$11,416.00	$135,883.35
5	PTM	24518	$1,315,477.15	-$157,960.99	$1,157,516.16
6	VMA	23180	$1,794,460.01	-$775,162.48	$1,019,297.53
7	ENM	20302	$1,149,816.09	-$133,556.54	$1,016,259.55
8	TRV	20296	$1,347,966.15	-$620,722.70	$727,243.45
9	SSM	18162	$1,210,505.00	-$137,698.25	$1,072,806.75
10	HRM	16935	$1,106,808.20	-$110,628.10	$996,180.10
11	HWA	14162	$983,492.45	-$495,349.80	$488,142.65
12	ENW	13445	$68,916.80	-$32,103.95	$36,812.85
13	STM	11880	$75,800.98	-$3,474.98	$72,326.00
14	DPM	11463	$732,942.55	-$108,414.12	$624,528.43
15	SEA	11221	$1,385,181.70	-$680,772.60	$704,409.10
16	GLA	10742	$1,341,600.50	-$678,679.25	$662,921.25
17	MPA	10041	$654,364.00	-$292,946.00	$361,418.00
			$28,068,117.93	**-$11,191,819.77**	**$16,876,298.16**
1	ESW	9994	$9,136.90	-$5,037.60	$4,099.30
2	FPM	9742	$528,766.84	-$89,334.51	$439,432.33
3	LCM	9114	$496,184.00	-$126,988.15	$369,195.85
4	GLM	8851	$479,117.70	-$70,028.00	$409,089.70
5	SEM	8255	$397,802.40	-$59,089.35	$338,713.05
6	TEM	8110	$479,859.30	-$59,625.45	$420,233.85
7	VMM	7488	$508,829.82	-$63,317.79	$445,512.03
8	PCL	6647	$490,713.70	-$244,830.63	$245,883.07
9	ESM	6241	$352,938.59	-$48,613.14	$304,325.45
10	HWM	5936	$272,351.09	-$24,673.65	$247,677.44
11	HPM	5876	$423,517.20	-$47,349.55	$376,167.65
12	VSC	5564	$430,717.60	-$194,224.75	$236,492.85
13	SAM	5507	$363,658.55	-$48,701.30	$314,957.25
14	EPM	5357	$251,706.05	-$44,694.20	$207,011.85
			$5,485,299.74	**-$1,126,508.07**	**$4,358,791.67**

Civil Penalty Schedule
(Programs incepted after 6/30/93)

	PROD_CODE	Membership Count	Sum of Billings	Sum of Refunds	Sum of NET
1	MMT	4969	$359,757.60	-$159,577.86	$200,179.74
2	SYM	4841	$239,259.00	-$32,424.24	$206,834.76
3	ENP	4546	$989,650.55	-$334,615.35	$655,035.20
4	APM	4510	$237,094.85	-$33,897.20	$203,197.65
5	DMM	4280	$191,944.85	-$39,426.05	$152,518.80
6	MSM	3882	$193,508.85	-$20,394.85	$173,114.00
7	BMM	3566	$183,684.10	-$38,978.75	$144,705.35
8	EGM	3354	$186,226.55	-$23,304.35	$162,922.20
9	MBW	3150	$0.00	$0.00	$0.00
10	FS2	3129	$152,464.30	-$29,442.15	$123,022.15
11	ESP	3009	$688,296.70	-$219,770.80	$468,525.90
12	HPA	2896	$409,238.75	-$194,827.65	$214,411.10
13	VHA	2876	$246,420.50	-$103,451.40	$142,969.10
14	MSS	2697	$246,023.05	-$116,595.60	$129,427.45
15	HEN	2667	$123,994.00	-$54,499.40	$69,494.60
16	TEA	2651	$328,243.65	-$138,717.35	$189,526.30
17	SYA	2646	$345,313.70	-$153,664.55	$191,649.15
18	HSM	2490	$128,228.20	-$21,423.10	$106,805.10
19	SEU	2203	$485,356.25	-$138,490.75	$346,865.50
20	HTV	2078	$98,722.00	-$42,856.45	$55,865.55
21	TRW	2069	$4,286.65	-$2,091.35	$2,195.30
22	HPX	2003	$408,058.25	-$143,712.15	$264,346.10
23	HWW	1982	$15,783.20	-$8,980.30	$6,802.90
24	GLW	1879	$65.00	-$42.00	$23.00
25	ESI	1860	$75,149.19	-$32,366.50	$42,782.69
26	HGA	1794	$138,137.40	-$64,659.65	$73,477.75
27	FFM	1651	$6,549.00	-$783.00	$5,766.00
28	HPW	1639	$27.00	-$17.00	$10.00
29	EGR	1427	$284,054.25	-$87,376.30	$196,677.95
30	SPI	1340	$64,650.85	-$26,470.85	$38,180.00
31	SMT	1235	$75,488.15	-$42,194.70	$33,293.45
32	VMX	1093	$259,143.15	-$88,602.65	$170,540.50
33	VMW	1086	$2,742.50	$0.00	$2,742.50
34	HRA	1067	$130,939.85	-$61,263.17	$69,676.68

Civil Penalty Schedule
(Programs incepted after 6/30/93)

	PROD_CODE	Membership Count	Sum of Billings	Sum of Refunds	Sum of NET
35	PCI	1050	$45,659.85	-$21,100.00	$24,559.85
36	MET	1035	$122,422.45	-$65,012.25	$57,410.20
37	ENI	1032	$40,215.57	-$12,247.24	$27,968.33
			$7,506,799.76	**-$2,553,276.96**	**$4,953,522.80**
1	FFA	988	$68,183.40	-$38,322.20	$29,861.20
2	CPW	923	$998.75	$0.00	$998.75
3	VMP	890	$44,169.30	-$17,915.10	$26,254.20
4	VHC	888	$96,765.85	-$50,924.30	$45,841.55
5	TPM	860	$35,795.80	-$14,840.60	$20,955.20
6	MMI	768	$37,301.00	-$16,492.85	$20,808.15
7	BMA	694	$125,627.70	-$57,141.30	$68,486.40
8	FTM	662	$29,871.80	-$6,720.20	$23,151.60
9	HSC	635	$18,469.25	-$1,584.25	$16,885.00
10	SWA	619	$40,940.33	-$8,187.59	$32,752.74
11	SSA	597	$78,180.55	-$27,775.60	$50,404.95
12	RSA	581	$46,680.75	-$21,503.14	$25,177.61
13	BMW	497	$0.00	$0.00	$0.00
14	VHM	463	$30,507.00	-$3,501.55	$27,005.45
15	CTI	452	$22,469.05	-$10,595.10	$11,873.95
16	STW	408	$0.00	$0.00	$0.00
17	SPW	399	$22,614.25	-$6,700.66	$15,913.59
18	SEI	393	$33,261.55	-$22,329.20	$10,932.35
19	GMH	379	$24,225.95	-$1,476.65	$22,749.30
20	TRM	369	$15,598.01	-$3,556.78	$12,041.23
21	PTA	358	$39,377.10	-$19,041.65	$20,335.45
22	PCW	338	$159.90	-$159.90	$0.00
23	SPM	330	$8,195.00	-$1,938.80	$6,256.20
24	CCP	327	$15,021.70	-$7,015.23	$8,006.47
25	CSM	326	$1,097.00	-$157.00	$940.00
26	CTX	233	$72,724.20	-$11,975.70	$60,748.50
27	SMH	222	$10,438.90	-$690.60	$9,748.30
28	GMG	215	$0.00	$0.00	$0.00
29	TRI	211	$7,264.25	-$3,170.40	$4,093.85
30	VSM	208	$11,120.55	-$1,517.00	$9,603.55
31	MCO	200	$16,695.65	-$4,296.00	$12,399.65

Civil Penalty Schedule
(Programs incepted after 6/30/93)

	PROD_CODE	Membership Count	Sum of Billings	Sum of Refunds	Sum of NET
32	CLA	195	$0.00	$0.00	$0.00
33	BBA	186	$5,557.30	-$1,465.70	$4,091.60
34	HGI	176	$8,303.60	-$2,068.15	$6,235.45
35	SYW	155	$12,037.72	-$3,643.66	$8,394.06
36	GLI	150	$13,870.50	-$6,921.85	$6,948.65
37	SVA	134	$11,204.60	-$4,266.25	$6,938.35
			$1,004,728.26	**-$377,894.96**	**$626,833.30**
1	TEW	96	$0.00	$0.00	$0.00
2	HGW	82	$0.00	$0.00	$0.00
3	CS2	73	$2,821.40	-$741.85	$2,079.55
4	GWM	71	$3,363.75	-$777.40	$2,586.35
5	STA	60	$509.25	-$129.80	$379.45
6	ETW	59	$0.00	$0.00	$0.00
7	BMP	50	$2,912.70	-$917.70	$1,995.00
8	EGA	50	$4,523.15	-$2,738.90	$1,784.25
9	NXA	49	$1,457.05	-$647.60	$809.45
10	SHW	46	$0.00	$0.00	$0.00
11	PMG	42	$2,425.55	$0.00	$2,425.55
12	GLH	40	$4,898.35	-$1,583.55	$3,314.80
13	AAA	38	$0.00	$0.00	$0.00
14	MSI	37	$1,248.45	-$319.55	$928.90
15	GLQ	31	$1,203.30	-$534.25	$669.05
16	MHM	29	$2,004.70	-$143.35	$1,861.35
17	QIQ	29	$0.00	$0.00	$0.00
18	SXM	29	$350.25	-$117.75	$232.50
19	HPC	28	$28.00	$0.00	$28.00
20	WWF	28	$883.55	-$573.65	$309.90
21	HMM	27	$27.00	$0.00	$27.00
22	MSH	27	$0.00	$0.00	$0.00
23	EMG	26	$1,404.80	$0.00	$1,404.80
24	MPQ	26	$873.54	-$246.87	$626.67

Civil Penalty Schedule
(Programs incepted after 6/30/93)

	PROD_CODE	Membership Count	Sum of Billings	Sum of Refunds	Sum of NET
25	NXM	26	$648.85	-$256.80	$392.05
26	MPM	23	$813.15	-$27.80	$785.35
27	VMI	22	$1,157.10	-$219.45	$937.65
28	TXA	21	$2,038.30	-$456.15	$1,582.15
29	BFW	18	$0.00	$0.00	$0.00
30	EXM	17	$730.60	-$118.15	$612.45
31	SEH	16	$1,849.40	-$849.75	$999.65
32	ACL	14	$1,349.10	-$759.50	$589.60
33	VSH	14	$989.50	-$482.50	$507.00
34	PCM	13	$640.70	-$36.80	$603.90
35	TXM	13	$592.95	-$37.65	$555.30
36	WWW	11	$549.45	$0.00	$549.45
37	DMA	10	$0.00	$0.00	$0.00
38	DPW	10	$0.00	$0.00	$0.00
39	SXA	9	$0.00	$0.00	$0.00
40	ACM	7	$580.35	-$39.75	$540.60
41	MSQ	6	$174.65	-$74.85	$99.80
42	SEQ	6	$1,141.05	-$120.90	$1,020.15
43	EXA	5	$139.90	$0.00	$139.90
44	MHS	4	$1,439.40	-$119.95	$1,319.45
45	STV	4	$369.75	-$174.50	$195.25
46	ASM	2	$0.00	$0.00	$0.00
47	CSS	2	$0.00	$0.00	$0.00
48	FS1	2	$0.00	$0.00	$0.00
49	HGM	2	$53.75	-$7.00	$46.75
50	TMG	2	$5.95	$0.00	$5.95
51	DB2	1	$0.00	$0.00	$0.00
52	DPA	1	$0.00	$0.00	$0.00
53	MMM	1	$0.00	$0.00	$0.00
54	MMW	1	$0.00	$0.00	$0.00
55	SMG	1	$13.90	$0.00	$13.90
56	SSC	1	$0.00	$0.00	$0.00
			$46,212.59	**-$13,253.72**	**$32,958.87**